RAMANATHAN CHELLIAH

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
ABDULL HAMID EMBONG J
[CRIMINAL APPEAL NO: 42-45-1996]
24 FEBRUARY 2005

CRIMINAL PROCEDURE: *Grounds of decision - Delay in writing - Delay of five years - Reference made to demeanour of witnesses - Whether prejudicial to appellant - Whether incurable - Whether conviction to be nullified - Standard of proof at end of prosecution case - Whether wrong principle applied - Penal Code s. 354 - Criminal Procedure Code, ss. 173(f), 271, 422*

In this appeal by the appellant against his conviction for offences under s. 354 of the Penal Code, a question arose as to whether a delay of five years on the part of the trial judge in writing the grounds of judgment had so prejudiced the appellant that the conviction ought to be nullified. The facts also showed that the trial judge had found a *prima facie* case against the appellant on 1 February 1995. That being so, a question further arose as to whether the trial judge could properly have adopted such standard of proof in her grounds of judgment five years later (ie, following *Tan Boon Kean v. PP* [1995] 4 CLJ 456 at the expense of *Khoo Hi Chiang v. PP & Anor Case* [1994] 2 CLJ 151) when, in 1997, a quorum of seven justices of the Federal Court in *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597 had disagreed with *Tan Boon Kean* and restored the maximum evaluation test propounded by *Khoo Hi Chiang*. These posers aside, the Deputy Public Prosecutor submitted that delay *per se* in preparing the grounds of judgment could not prejudice the appellant, and further that, even if the trial judge had used an incorrect test in determining the standard of proof, it was curable under s. 422 of the Criminal Procedure Code ('CPC').

Held (allowing the appeal):

[1] The guiding principle regarding delay by the court to supply the grounds of judgment is now settled. An appellate court would readily accept the allegation of prejudice on the basis that there was likelihood not only that the trial judge's impression on demeanour of witnesses would be blurred, but also that the delay would increase the chances of omission on the part of the trial judge to deal with material facts and issues in the grounds of judgment which could be favourable to the appellants. (p 861 a-c)

[2] Eighteen witnesses had testified before the trial judge and her decision was in the main based on the evaluation of those witnesses' testimonies which included the appraisal of their demeanour. It was also evident that no remarks as to the demeanour of the witnesses was made by the trial judge in her notes of evidence. Hence, to advert to the demeanour of the witnesses after a long lapse of over five years is certainly prejudicial to the appellant. (pp 861 g & 862 d-h)

[3] When the trial judge wrote her grounds of judgment in 2001, she had applied the test laid down in *Tan Boon Kean*, on a principle which was no longer good law by then. Based on that erroneous standard of proof (applied five years after the trial in evaluating the prosecution witnesses, demeanour included), it cannot be said now that that misdirection is capable of cure under s. 422 CPC. The error had occasioned a failure of justice which is 'incurably illegal'. (pp 863 d & 864 c)

[Conviction set aside; appellant discharged.]

Case(s) referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP And Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
David Anthony v. PP [1985] 1 MLJ 453 ***(refd)***
Dr Soo Fook Mun v. Foo Fiona & Anor [2001] 2 CLJ 457 CA ***(refd)***
Hiew Min Yong v. PP [2001] 5 MLJ 1 ***(refd)***
Khoo Hi Chiang v. PP And Another Appeal [1994] 2 CLJ 151 SC ***(refd)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843 FC ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Tan Hun Wah v. PP And Another Appeal [1994] 2 CLJ 181 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(f), 271, 422

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the prosecution - Anselm Charles Fernandiz DPP

Reported by WA Sharif

JUDGMENT

Abdull Hamid Embong J:
Judgment of guilty was entered on the appellant on 8 November 1996 and the learned sessions court judge sentenced him to a term of imprisonment of four years on each of the following two charges:

1st charge:

Bahawa kamu di antara 9.00 malam hinggga 10.00 malam antara 23.10.92 hingga 27.10.92, di bilik nombor 1015 Bangunan Persatuan Bola Keranjang Malaysia Jalan Hang Jebat, di daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, telah menggunakan kekerasan jenayah ke atas Rasidah bt. Othman, K/P: A 3557255 dengan niat untuk mencabul kehormatannya dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 354 Kanun Keseksaan dan boleh dihukum di bawah Seksyen yang sama.

2nd charge:

Bahawa kamu di antara 9.00 malam hingga 10.00 malam antara 23.10.92 hingga 27.10.92, di bilik nombor 1015 Bangunan Persatuan Bola Keranjang Malaysia Jalan Hang Jebat, di daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, telah menggunakan kekerasan jenayah ke atas Manimagaly a/p Nadaraja, K/P: A 3122232 dengan niat untuk mencabul kehormatannya dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 354 Kanun Keseksaan dan boleh dihukum di bawah Seksyen yang sama.

Before this court, two grounds were canvassed to nullify this conviction, namely:

1. Delay In The Judgment:

The grounds of judgment written by the learned sessions judge was made available to the appellant on 26 October 2001, almost five years from the date the judgment was pronounced. It was submitted by learned counsel for the appellant that this delay was too long and inordinate and that the learned sessions court judge had not given any reasons for it. She had also failed to comply with the Chief Justice's directive to prepare the grounds of judgment within six weeks. This latter ground must not however be taken as a hard and fast rule but an administrative guideline. I am aware that magistrates and Session Courts Judges are subject to transfer at sometimes short notices and in the process there could arise a lot of administrative disruptions in their duties, one of which is to prepare their grounds of judgments left behind when they take up new postings.

The inordinate delay causing prejudice to the appellant is however a justiciable cause for this court's consideration. This ground is also guided by legal principles decided by the apex court of the country.

The guiding principle regarding delay by the court to supply the grounds of judgment is now settled and the Supreme Court in *Tan Hun Wah v. Public Prosecutor and Another Appeal* [1994] 2 CLJ 181 had clearly stated that principle. In that case the trial was spread over a period of some nine months and six days and there was a delay of three years and three months in supplying the grounds of judgment. It was held by the Supreme Court:

> The general principle that 'justice delayed is justice denied' does not mean that every form of delay should result in vitiating the whole proceedings. However, the principle of fair trial should be applied even more rigorously where the excessive delay is caused not by the prosecution but by the trial court itself. If the facts of a case warrant it, where there is a long delay in the supply of grounds of judgment, an appellate court would readily accept the allegation of prejudice on the basis that there was every likelihood not only that the trial judge's impression on demeanour of witnesses would be blurred, but also the delay would increase the chances of omission on the part of the trial judge to deal with material facts and issues in the grounds of judgment, which ought to have been favourable to the appellants.

Learned counsel also adverted this court to the case of *Dr. Soo Fook Mun v. Foo Fiona & Anor.* [2001] 2 CLJ 457 to state the principle that a long delay has the effect of diminishing the weight an appeal court normally leads to the views upon the credibility of witnesses made by a trial court.

It cannot be overly emphasized that one of the main functions of a trial court is the evaluation of evidence unfolded before it and this can only be achieved through its evaluation on the credibility of witnesses which the trial court had the advantage of assessing in the audio-visual proceeding before it. This evaluation of their oral evidence also forms a substantial basis in coming to a decision. As such a long delay in writing his judgment could indeed blur a judge's decision especially in coming to a conclusion based on the credibility of witnesses, which includes their performance in the witness box, their demeanour et al, which form the foundation of making a properly evaluated finding.

In this case, 18 witnesses testified, 12 for the prosecution and 6 for the defence. The decision of the learned sessions court judge, as can be seen from her lengthy grounds were, in the main based on the evaluation of those witnesses' testimonies which included the appraisal of their demeanour. For instance at para. 70 of her judgment she concluded that SP2 "pada keseluruhannya seorang saksi yang lurus, berterus terang dan pemalu". Similarly, the learned sessions judge accepted SP1's evidence by concluding at para. 44 of her judgment "Saya menerima pada amnya keterangan SP1 sebagai keterangan yang boleh dipercayai walaupun ada banyak kali beliau

hanya dapat menjawab secara umum/agak-agak sahaja". The learned sessions judge also rejected the evidence of the defence witnesses notably that of SB2, SB3 and SB6, also based on their credibility. For example at para. 130.2 of her judgment she opined that SB6 is a defence witness with an interest and found him to be an inconsistent witness.

The learned deputy public prosecutor had submitted that a delay *per se* in preparing the grounds of judgment could not prejudice the appellant. It was submitted that the learned sessions judge had analysed the facts and considered the demeanour of the main witnesses. In support the learned deputy cited *Jai bin Adam @ Zainuddin bin Adam v. Public Prosecutor* where it was held that unfairness and prejudice should be sufficiently established. However in that case, the facts and circumstances of the case brought the learned judge to the conclusion that the principle of *Tan Hun Wah* did not apply since that case primarily involved documentary evidence and as such oral evidence and the demeanour of witnesses did not play a vital role. Not so in the instant case before me. Even the learned deputy had observed that the learned sessions judge here had considered the demeanour of witnesses in her grounds of judgment. It may be noted that there was nothing mentioned in the notes of evidence on the learned sessions judge's observation on the demeanour of the witnesses. This she could do as permissible under s. 271 of the Criminal Procedure Code which states:

> A presiding Magistrate recording the evidence of a witness may, at the conclusion of such evidence and at the foot of the notes thereof, record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

This provision allows for a presiding judge to make remarks on the demeanour of witnesses. (See *David Anthony v. PP* [1985] 1 MLJ 453). It is indeed a salutary practice particularly if a trial is expected to drag over a long period, as is the case here. Without the assistance of the remarks on witnesses' demeanour while giving evidence especially on their hesitation, doubts, variations of language, mood changes or composure, amongst other traits, there is every likelihood of prejudice or mistake arising when considering their credit after a protracted delay. To now advert to the demeanour of witnesses after a long lapse of over five years, in my view, would certainly be prejudicial to the appellant here. An appellate court will be guided by the impression on the demeanour of witnesses observed by a trial judge in his grounds of judgment but any such remarks if made too long after the trial should be of little or no weight, and may be found as here, to be prejudicial to the appellant.

2. Misdirection On The Standard Of Proof At The End Of The Prosecution Case

The learned sessions court judge had found a *prima facie* case against the appellant on 1 December 1995. She had then adopted the correct direction on the burden of proof on the prosecution at its stage of the trial under s. 173(f) CPC, which required a beyond a reasonable doubt standard after a maximum evaluation of the prosecution evidence. What learned counsel for the appellant questioned was the finding of a *prima facie* case by the learned sessions court judge in her grounds of judgment five years later, by adopting the test laid down in the case of *Tan Boon Kean v. PP* [1995] 4 CLJ 456, which departed from the principle laid down earlier in *Khoo Hi Chiang v. PP and Anor. Appeal* [1994] 2 CLJ 151. It was submitted that that case was overruled by *Arulpragasan v. PP* [1996] 4 CLJ 597 where a quorum of seven justices of the Federal Court had on 27 July 1996, disagreed with *Tan Boon Kean* and restored the maximum evaluation test of the prosecution case as laid down by the five member panel of the Supreme Court in *Khoo Hi Chiang*. So, when the learned sessions court judge wrote her grounds of judgment in 2001, she had applied the test laid down in *Tan Boon Kean*, on a principle which was no longer by then good law. Learned counsel for the appellant had submitted that this confusion on the part of the learned sessions court judge amounted to a serious misdirection and judicial defiance, which vitiated the whole proceeding. The learned deputy, while noting that, even if the learned sessions judge had used the incorrect test in determining the standard of proof, relied upon s. 422 of the Criminal Procedure Code, submitting that the proceedings could be saved thereunder. The case of *Public Prosecutor v. Ishak bin Hj. Shaari & Other Appeals* [2003] 3 CLJ 843 was referred to by both parties. In that case the Court of Appeal held that if there were sufficient evidence to warrant a conviction, then there would not be a miscarriage or failure of justice, and any misdirection on the applicable standard of proof would be curable under s. 422 CPC. The learned deputy had urged this court to analyse the evidence and come to a conclusion that there had not been a failure of justice in the sessions court coming to its conclusion on the guilt of the appellant. Learned counsel for the appellant took the stand that since the correct test was a maximum evaluation of the testimonies of witnesses, which includes the evaluation of their demeanour, this court should be scrupulous in evaluating those witnesses merely on the cold print of the notes.

In *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor and Another Appeal* [2004] 3 CLJ 737, the Federal Court had opined that "an appellate court should not put a brake and not going any further the moment that it sees that the trial judge says that that is his finding of facts. It should go further and examine the **evidence and circumstances** under which that finding is made and see whether ... there are substantial and compelling reasons for disagreeing with the finding. (emphasis added)

It is in this context that this court sitting in its appellate jurisdiction had considered the error on the standard of proof used by the learned sessions court judge. In my view, based on that erroneous standard of proof which she applied over five years after the trial in evaluating the prosecution witnesses, demeanour included, it cannot be now said that that misdirection of law is capable of cure under s. 422 CPC. I therefore held that that error had occasioned a failure of justice which, borrowing the phrase of the Court of Appeal in *Ishak Hj. Shaari* is "incurably illegal".

The long delay in delivery of the judgment coupled with the misdirection on the legal burden of proof by the learned sessions judge, would make it inappropriate to order a retrial of this case. (See *Hiew Min Yong v. Public Prosecutor* [2001] 5 MLJ 1.

For these reasons, I had allowed the appeal, set aside the conviction and acquitted and discharged the appellant.